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In The
Supreme Court Of The United States

October Term, 1996

FIRST SECURITY BANK, et al.,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and FIRST VIRGINIA BANK-SOUTHWEST, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petition for Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts erred in permitting the Federal Deposit Insurance Corporation (FDIC) to assume control of direct, nonderivative causes of action which had been filed by a bank's shareholders before the FDIC's appointment as receiver of the bank, when no statute authorizes the FDIC to succeed to such nonderivative causes of action.

2. Whether the lower courts erred in permitting substitution of the FDIC as plaintiff with respect to derivative claims which had been filed by a bank's shareholders on behalf of the bank before the FDIC's appointment as receiver of the bank, despite admitted conflicts of interest on the part of the FDIC in prosecuting the action against the defendants, and notwithstanding the fact that success in the lawsuit would generate a receivership surplus which would be disbursed to the shareholders.

3. Whether the lower courts erred in denying the Petitioners' motions to intervene in order to monitor the FDIC's prosecution of the derivative and nonderivative claims, when the Petitioners demonstrated that they held an interest in the subject matter of the litigation, that disposition of the action would impede their ability to protect that interest, and that the interest was not adequately represented by the FDIC.

PARTIES BELOW

As required by Sup. Ct. R. 14.1(b), the Petitioners submit the following list of all parties to the proceedings in the lower courts:

The Petitioners (the original plaintiffs below and petitioning intervenor, Joseph L. Anthony) are:

First Security Bank[1]
James D. Fralin
Carlos E. Gutierrez
Dennis R. Cronk
Paul G. Black
Jerry W. Brinkley
Alfred Silverstein
James M. Grasse
Lynn J. Reese
Joseph L. Anthony

The Federal Deposit Insurance Corporation-Receiver[2] was a substituted party-plaintiff in the United

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[1]First Security Bank (a plaintiff in the underlying case) has no parent corporation and is not the parent of any subsidiary corporation.

[2]The FDIC-Receiver is a subsidiary-type entity vis-a-vis the FDIC. Further, the FDIC-Corporate (a separate entity by law from the FDIC-Receiver) is affiliated with the FDIC-Receiver, and has a financial interest in the FDIC-Receiver's liquidation of any defunct financial institutions in that it funds all deficiencies related to the administration of the receivership estate.

States District Court action; was an appellee in the Fourth Circuit court proceedings; and, is a Respondent related to this Petition for Certiorari.

The other Respondents (who were defendants below) are:

First Virginia Banks, Inc.[3]

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[3]First Virginia Banks, Inc. (a named defendant in the underlying case), is a bank holding company (the Parent Company), owning stock in over 16 member banks (i.e., subsidiaries), which are not wholly owned, including: First Virginia Bank, Clifton Trust Bank, First Virginia Bank-Central Maryland, First Virginia Bank-Maryland, First Virginia Bank-Central, First Virginia Bank-Colonial, First Virginia Bank-Commonwealth, First Virginia Bank-South Hill, First Virginia Bank of Tidewater, First Virginia Bank of Augusta, First Virginia Bank-Planters, First Virginia Bank-Shenandoah Valley, First Virginia Bank-Clinch Valley, First Virginia Bank-Franklin County, First Virginia Bank-Highlands, First Virginia Bank-Piedmont, First Virginia Bank-Southside, First Virginia Bank-Southwest (a named defendant in the underlying case), Bank of Madisonville, First Virginia Bank-Mountain Empire, and Tri-City Bank and Trust Company. First Virginia Banks, Inc., also owns stock in over four nonbanking affiliates/subsidiaries, including: First Virginia Mortgage Company, First General Mortgage Company, First Virginia Life Insurance Company, and First Virginia Insurance Services, Inc. Further, First Virginia Banks, Inc., owns stock in several service subsidiaries, including: First Virginia Services, Inc., Northern Operations Center, Inc., Eastern Operations

First Virginia Bank-Southwest[4]
Henry H. Hicks Jr.
James N. Hinson Jr.
Ellis L. Gutshall
Robert H. Zalokar
Thomas E. Hartman
Richard A. Hess

Center, Inc., Southwest Operations Center, Inc., Tennessee Operations Center, Inc., and Springdale Advertising Agency, Inc.

[4]As noted in footnote no. 3, this corporation is a nonwholly owned banking subsidiary of the defendant, First Virginia Banks, Inc. First Virginia Bank-Southwest has no known subsidiary.

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OPINIONS BELOW

On September 29, 1992, the United States District Court for the Western District of Virginia issued an unpublished opinion directing that the Federal Deposit Insurance Corporation (FDIC) be substituted as plaintiff in the stead of First Security Bank, its officers, directors, and shareholders (collectively, the "shareholders") with respect to the shareholders' derivative claims. The district court's order appears in the Appendix at A-1.

On September 10, 1993, the district court granted, by unpublished order, the FDIC's motion to strike the shareholders' Notice of Appearance of Counsel. In the same order, the court ordered the shareholders' counsel to file a motion to intervene describing "each and every *non*derivative claim that he represents" (emphasis added). The order is set forth in the Appendix at A-6.

On June 9, 1994, the district court denied, in an unpublished order, the shareholders' motion to intervene. The order is reproduced in the Appendix at A-8.

On August 15, 1994, the district court denied a motion filed by Joseph L. Anthony to intervene in his own right. This opinion appears in the Appendix at A-10.

On July 10, 1995, the district court, by unpublished order, dismissed the shareholders' complaint with prejudice based upon a settlement reached between the FDIC and the defendants in the case. The Dismissal Order is set forth in the Appendix at A-12.

On July 25, 1995, the district court denied a motion filed by the shareholders and Anthony seeking an in

camera review of the settlement agreement between the FDIC and the defendants. This order is included in the Appendix at A-15.

On July 22, 1996, the United States Court of Appeals for the Fourth Circuit issued an unpublished, per curiam opinion affirming the district court orders challenged by the shareholders and Anthony. The Fourth Circuit's opinion appears in the Appendix at A-17.

On September 25, 1996, the Fourth Circuit, in an unpublished order, denied the shareholders' and Anthony's Petition for Rehearing and Suggestion for Rehearing In Banc. This summary order is reproduced in the Appendix at A-26.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Fourth Circuit's September 25, 1996 decision denying the Petitioners' Petition for Rehearing constituted the final disposition of the case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(2) General powers

(A) Successor to institution

The [FDIC] shall, as conservator or receiver, and by operation of law, succeed to—

> (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution[.]

12 U.S.C. § 1821(d)(2)(A)(i).

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a).

STATEMENT OF THE CASE

As is apparent from the summary below, the procedural history of this case is somewhat convoluted. Essentially, through a series of orders, the district court turned over to the FDIC complete control of a lawsuit which had been instituted by the Petitioners–including causes of action which, by their nature, could generate no recovery for the failed bank's receivership estate–notwithstanding acknowledged conflicts of interest on the part of the FDIC in pursuing a recovery from the defendants. Not only did the court deprive the Petitioners of the right to control the litigation, but it precluded them from intervening in order to monitor the proceedings, and even deprived them of a right to review the settlement agreement between the FDIC and the defendants.

Proceedings Below

First Security Bank ("First Security") and certain of its directors and shareholders initiated the underlying action on April 18, 1991. On May 24, 1991, First Security was declared insolvent, and the FDIC was appointed its receiver.

More than a year later, on July 31, 1992, the FDIC filed a motion with the district court seeking substitution of the FDIC for the Petitioners insofar as the Petitioners sought recovery on behalf of First Security. On September 29, 1992, the district court, per Judge Turk, granted the motion, directing that the FDIC be substituted as plaintiff in the place of the Petitioners with respect to the Petitioners' "derivative" claims.

After Judge Kiser replaced Judge Turk in the case, Judge Kiser entered an order granting the FDIC's motion to strike the Petitioners' notice of appearance of counsel with respect to the derivative claims. Judge Kiser's order included language which appeared to require the Petitioners to file a motion to intervene in order to maintain control of the Petitioners' direct claims against First Virginia Bank-Southwest ("FVB") and its employees (the "nonderivative" claims).

In accordance with Judge Kiser's instructions, the Petitioners filed, on January 3, 1994, a motion to intervene. On June 9, 1994, the district court denied the Petitioners' motion to intervene with respect to both the derivative and nonderivative claims.

On July 1, 1994, Petitioner Joseph L. Anthony sought to intervene in his own right based upon his 30% outright ownership interest in the entire lawsuit. The trial court denied Anthony's motion on August 15, 1994.

Subsequently, on July 10, 1995, the district court dismissed the complaint with prejudice based upon a settlement reached between the FDIC and the defendants. The court denied, on July 25, 1995, the Petitioners' motion seeking an in camera review of the settlement agreement.

The Petitioners filed timely appeals to the Fourth Circuit of all the orders outlined above. On July 22, 1996, the Fourth Circuit affirmed in a summary opinion the district court orders challenged by the Petitioners. On September 25, 1996, the Fourth Circuit denied the shareholders' and Anthony's Petition for Rehearing and Suggestion for Rehearing In Banc.

The Petitioners thereafter filed this Petition for Certiorari in a timely fashion.

Statement of Facts

The Petitioners seek in this action to recover damages in the amount of $84 million resulting from a fraudulent scheme which was spawned in 1987 by Respondent Thomas E. Hartman, a former employee of Respondent First Virginia Bank-Southwest, and sustained through 1991 with the active participation of FVB. All parties now agree that in 1987 and 1988 Hartman and other FVB employees caused FVB to issue numerous "strawman" loans by creating loan applications which falsely represented the names of borrowers and the purposes of the loans.

When FVB became aware of Hartman's scheme in May 1988, it set out to protect itself from the consequences of Hartman's fraudulent activities. In order to shield itself from adverse consequences which would have resulted if the details of Hartman's wrongdoing became known in the Roanoke banking community and to the public, FVB did not terminate Hartman or take other steps which might indicate that Hartman was suspected of improper conduct. Instead, Hartman remained nominally in FVB's employ until Hartman was hired by First Security in mid-1988 as a vice-president and senior loan officer.

After arriving at First Security, Hartman–with the knowledge and active participation of FVB–arranged for First Security to issue loans to the strawman "borrowers" to which FVB had previously extended loans. As a result, the bulk of the uncollectible loans which had previously

been held in FVB's loan portfolio were transferred to First Security.

Hartman also caused First Security to issue over $200,000 in common stock to certain Petitioners herein, who relied upon the fraudulent appearances and representations resulting from the activities of FVB and Hartman.

When First Security learned of the pervasiveness of the damages it had suffered as a result of the wrongful actions of Hartman and FVB, it decided to engage legal counsel within an arrangement which it believed would minimize its costs but maximize its recovery. Accordingly, on April 17, 1991, individual shareholders and First Security, as assignors, executed an engagement-of-services contract which conveyed to Anthony, as assignee, an absolute right to 30% of any recovery from the Respondents upon the filing of any legal action.

About a month later, on May 24, 1991, First Security was declared insolvent–largely as a result of losses it had suffered due to Hartman's and FVB's fraud–and the FDIC was appointed First Security's receiver. For more than a year after the date of the FDIC's appointment, the FDIC refused to file an entry of appearance in the litigation, notwithstanding the Petitioners' repeated attempts to procure the FDIC's participation in the lawsuit. The FDIC informed the Petitioners that it had a "conflict" and a "dilemma" in prosecuting the action against FVB, a nondefunct, FDIC-insured bank.

Subsequently, however, the FDIC decided to participate in the litigation, notwithstanding its

acknowledged conflict of interest. On July 31, 1992, the FDIC filed a motion with the district court seeking substitution of the FDIC for the Petitioners with respect to the *derivative* claims. On September 29, 1992, Judge Turk of the Western District of Virginia directed that the FDIC be substituted as plaintiff in the place of First Security, its officers, directors, and shareholders "in their derivative capacities." Nothing in the September 29, 1992 order even suggested that the FDIC was to succeed to the Petitioners' *nonderivative* claims, however. Indeed, all parties thereafter assumed that the Petitioners' right to maintain the nonderivative claims was unaffected by the order.

After Judge Kiser replaced Judge Turk in the case, the Petitioners filed a Notice of Appearance of Counsel and a motion to intervene in order to monitor the prosecution of the derivative claims. The Petitioners alleged that they were entitled to intervene of right under Fed. R. Civ. P. 24(a) because the FDIC was not adequately representing their claims.

On September 10, 1993, Judge Kiser granted the FDIC's motion to strike the Petitioners' Notice of Appearance of Counsel. In addition, although the Petitioners' right to litigate the nonderivative claims had already been settled and was not at issue before Judge Kiser, the order required Anthony to file a motion to intervene "setting forth with specificity each and every nonderivative claim that he represents."

In accordance with the district court's instructions, the Petitioners filed, on January 3, 1994, a motion to intervene in order to prosecute, inter alia, the nonderivative claims. The Petitioners referred the court to a letter from Anthony to Judge Kiser specifically

describing the Petitioners' nonderivative claims, and they pointed out that their right to pursue the nonderivative claims had never been at issue. On June 9, 1994, Judge Kiser denied the Petitioners' motion to intervene.

Anthony, on July 1, 1994, filed a motion to intervene in his own right, based upon his 30% outright ownership interest in the entire lawsuit. The district court denied Anthony's motion on August 15, 1994.

Subsequently, on July 19, 1995, the trial court dismissed the complaint with prejudice based upon a settlement reached between the FDIC and the defendants. The court then denied, on July 25, 1995, the Petitioners' motion seeking an in camera review of the settlement agreement.

Although the record does not disclose the terms of the settlement agreement, it is clear that the FDIC's recovery under the agreement will not generate a receivership surplus. However, the damages sought by the Petitioners in their derivative claims, if recovered, would easily render the receivership estate solvent. By statute, the resulting surplus would be disbursed to the Petitioners.

To summarize, the FDIC has been conferred complete control over litigation in which it has admitted a conflict of interest. The Petitioners have been deprived of the right to manage the litigation despite the fact that the lawsuit, if prosecuted diligently, could generate a receivership surplus. Further, the FDIC has been substituted as plaintiff with respect to the nonderivative claims–claims which, by their nature, can result in no recovery to the receivership estate. Finally, despite the Petitioners' significant interest in the outcome of the

lawsuit and the FDIC's acknowledged reluctance to pursue a full recovery from the defendants, the Petitioners have been denied the right to intervene or to otherwise monitor the FDIC's prosecution of both the derivative and nonderivative claims.

Because (1) all efforts on the part of the Petitioners to participate in the litigation have been rebuffed by the courts below, and (2) the FDIC has failed to prosecute the lawsuit zealously in order to protect a solvent, FDIC-insured institution from a potentially ruinous damages award, entities which played a major role in the insolvency of First Security and in the resulting losses to the Petitioners have been insulated from liability for the damages they caused to the Petitioners.

REASONS FOR GRANTING THE WRIT

During the banking crisis of the 1980s and early 1990s, Congress and the courts significantly expanded the scope of the FDIC's receivership powers and protections. The lower courts in this case, however, have extended the reach of the FDIC's receivership powers in an unprecedented manner, well beyond the scope of the rights bestowed upon the FDIC by applicable statutes, and in direct contravention of federal statutes and rules as interpreted by this Court and other federal appellate courts. *Cf. Cummings Properties Management, Inc. v. FDIC*, 786 F. Supp. 144, 146 (D. Mass. 1992) (expanded protection "does not elevate the FDIC to the position of a sacred cow which may graze upon the rights of others at will, unchecked by the courts").

As discussed below, the lower courts in this case erred in their disposition of three issues of considerable

national importance. First, the courts erred in depriving the Petitioners of the right to pursue their nonderivative claims against the defendants. Because no statutory authority exists for such action, the lower courts' orders violated this Court's recent pronouncement that federal common-law rights can no longer be created in favor of the FDIC. A failure by a lower court to adhere to a decision of this Court is grounds for granting a writ of certiorari. Sup. Ct. R. 10(c); *see Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966); *Heflin v. United States*, 358 U.S. 415 (1959). Moreover, a split exists among the Circuits as to the FDIC's priority rights with regard to nonderivative causes of action filed by shareholders of a failed financial institution; a Circuit split also justifies review on certiorari. Sup. Ct. R. 10(a); *see, e.g., Braxton v. United States*, 500 U.S. 344 (1991). Additionally, the Fourth Circuit declined to follow *its own* precedent in permitting transfer of control of the nonderivative causes of action to the FDIC; such a departure from the usual course of judicial conduct calls for an exercise of this Court's supervisory power. Sup. Ct. R. 10(a).

Second, the courts erred in permitting substitution of the FDIC as plaintiff for the purpose of prosecuting the derivative causes of action. In light of the possibility of a receivership surplus, the Petitioners held a significant interest in the outcome of the lawsuit even after First Security was declared insolvent and the FDIC was appointed its receiver. Further, control of the lawsuit should not have been turned over to the FDIC in light of the FDIC's admitted conflict of interest in the litigation. The lower courts' orders permitting substitution of the FDIC as plaintiff with respect to the derivative claims are at odds with decisions of other federal courts of appeal and are, therefore, suitable for review by this Court.

The third fundamental error committed by the courts below was their refusal to allow the Petitioners to intervene for the purpose of monitoring the FDIC's prosecution of the derivative and nonderivative causes of action. In light of the FDIC's adverse incentives as well as Anthony's direct ownership interest in the lawsuit, the lower courts' orders are in clear conflict with the holdings of this Court and those of other Circuits.

I. THE LOWER COURTS ERRED IN DEPRIVING THE PETITIONERS OF THE RIGHT TO CONTROL PROSECUTION OF THE NONDERIVATIVE CAUSES OF ACTION.

The FDIC persuaded the lower courts that it was entitled to succeed to the nonderivative causes of action–claims for injuries unique to certain Petitioners and not shared by all shareholders of First Security or by First Security itself. Nothing in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), the omnibus statute governing the rights and duties of the FDIC, authorizes the FDIC to assume control of, or priority over, nonderivative causes of action filed by shareholders of a failed bank.

The one federal court of appeals which *has* permitted such an expansion of the FDIC's powers purported to create federal common law in favor of the FDIC. In *Gaff v. FDIC*, 919 F.2d 384 (6th Cir. 1990), *modified on other grounds*, 933 F.2d 400 (6th Cir. 1991), the Sixth Circuit declared that the FDIC assumes, under federal common law, an "absolute priority" over

shareholders' direct, nonderivative causes of action against former shareholders of a failed bank. Accordingly,

> a stockholder in this case must wait until the FDIC . . . has collected its damages from defalcating officers before the stockholder can pursue his or her direct action.

919 F.2d at 396.

The district court and the appellate court in the instant case expanded the scope of the FDIC's powers even more broadly than did the Sixth Circuit in *Gaff*. The courts below, by ordering the Petitioners to file a motion to intervene in order to prosecute the nonderivative causes of action and, thereafter, by denying the Petitioners' motion to intervene, effectively deprived the Petitioners of any possibility of pursuing the nonderivative claims.

This Court's opinion in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994), leaves no doubt that the *Gaff* court and the lower courts in this case were without authority to expand the scope of the FDIC's rights under federal common law. The Court in *O'Melveny* interpreted 12 U.S.C. § 1821(d)(2)(A)(i) as a *limitation* on the FDIC's receivership protections:

> It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional "federal common-law" exceptions

> is not to "supplement" this scheme, but to alter it.

Id. at 2054. Since no provision of FIRREA permits the FDIC, as receiver of a failed bank, to succeed to nonderivative actions filed by the bank's shareholders, the courts below were without authority to turn control of the nonderivative causes of action over to the FDIC.

Even before *O'Melveny* was handed down, other federal courts of appeal had declined to expand federal common law in this area. *See Popkin v. Jacoby (In re Sunrise Securities Litigation)*, 916 F.2d 874, 889 (3d Cir. 1990) ("To the extent that depositors assert individual, nonderivative fraud claims against the officers, directors, auditors, or attorneys of insolvent financial institutions, they may proceed on equal footing with FDIC against these defendants"); *FDIC v. Jenkins*, 888 F.2d 1537, 1546 (11th Cir. 1989) ("We are not convinced Congress considered collections against parties such as the bank-related defendants in this case as a necessary part of the recovery to the deposit insurance fund. Any such priority over third-party lawsuits will have to come from Congress, not this Court").

In fact, the Fourth Circuit failed to follow its own precedent in its disposition of the Petitioners' nonderivative claims. In *Howard v. Haddad*, 916 F.2d 167 (4th Cir. 1990), the plaintiff sued the directors of a failed bank on the ground that the directors had induced him to purchase shares in the bank without disclosing the precarious financial condition of the institution. The district court granted the FDIC's motions to intervene and to dismiss the action on the ground that the FDIC owned

all causes of action arising out of the directors' breach of duty.

In reversing, the Fourth Circuit first held that the plaintiff's claim that the directors had fraudulently induced him to buy the bank's stock–an allegation identical to that of certain of the Petitioners here–"clearly raises direct, non-derivative claims against the two directors." *Id.* at 169. The court reasoned that the plaintiff's claim could neither result in compensable injury to the corporation nor be said to derive from any claim also possessed by other shareholders. *Id.* at 170.

The court then turned to the FDIC's claim that the "absolute priority" rule entitled the FDIC to succeed to the plaintiff's cause of action, even if the claim was nonderivative. The FDIC, concluded the court, has no interest in such nonderivative claims. "We cannot see why the fact of liquidation should somehow act to deprive [the plaintiff] of these causes of action." *Id.*

In the instant case, the Petitioners' argument that the district court wrongfully deprived them of their right to pursue direct, nonderivative claims is even more compelling than that of the plaintiffs in *Popkin*, *Jenkins*, and *Howard*. Here, the nonderivative claims seek recovery *not* from the former directors of an institution that is under the receivership of the FDIC, but from a *solvent* financial institution, FVB, as well as from certain present and former employees of the solvent bank. The Petitioners were plainly entitled to litigate the nonderivative causes of action independent of the FDIC's prosecution of the derivative claims. This Court should grant the petition for certiorari in order to reverse the error of the courts below.

II. THE LOWER COURTS ERRED IN PERMITTING SUBSTITUTION OF THE FDIC AS PLAINTIFF WITH RESPECT TO THE DERIVATIVE CLAIMS.

As discussed above, First Security, before its insolvency, assigned to Anthony an outright 30% ownership interest in the derivative claims and, further, assigned to Anthony the exclusive right to prosecute the derivative claims on behalf of First Security. After the FDIC was appointed receiver of First Security, the FDIC petitioned the district court for an order substituting the FDIC as sole party plaintiff with respect to the derivative claims against the defendants. The FDIC argued that 12 U.S.C. § 1821(d)(2)(A)(i), pursuant to which the FDIC succeeds to "all rights, titles, powers, and privileges" of a failed bank and its shareholders, authorized the FDIC to supplant the Petitioners with respect to the derivative claims against the defendants. The district court granted the FDIC's motion to substitute; the order was subsequently affirmed by the Fourth Circuit.

The courts below erred in permitting substitution of the FDIC as plaintiff. Contrary to the FDIC's position, FIRREA does not bestow on the FDIC any right to succeed to shareholder derivative suits. In *Branch v. FDIC*, 825 F. Supp. 384 (D. Mass. 1993), the district court, reading § 1821(d)(2)(A)(i) in the context of other provisions of FIRREA, concluded that the statute does not divest a failed bank's shareholders of the right to assert a derivative action on behalf of the bank:

> Section 1821(d)(11)(B), however, substantially undermines a literal interpretation of section 1821(d)(2)(A)(i). Under section 1821(d)(11)(B), also enacted in 1989 by FIRREA, the shareholders of a failed bank remain entitled to "distribution . . . of amounts remaining [in the receivership] after payment of all other claims and expenses." 12 U.S.C. § 1821(d)(11)(B). Thus, through section 1821(d)(11)(B), failed financial institutions' shareholders retain virtually the same rights as do the shareholders of any other bankrupt corporation–the rights to the residual assets once debts to higher priority creditors have been satisfied. Therefore, despite its strong language, section 1821(d)(2)(A)(i) does not transfer all incidents of stock ownership.

Id. at 404. The United States Court of Federal Claims recently adopted the reasoning of the *Branch* case. *See Suess v. United States*, 33 Fed. Cl. 89, 96 (1995) ("[T]he fact that a failed association has been placed into receivership does not preclude [shareholders] from bringing a derivative suit. Accordingly, the Court rules that section 1821(d)(2)(A)(i) does not alter the settled rule that shareholders of failed national banks may assert derivative claims" (footnote omitted)).

Even if FIRREA could be construed to grant the FDIC the general right to succeed to shareholder derivative actions, the FDIC did not have such a right in the instant case for two reasons. First, the Petitioners' action, if successful, will generate a surplus in the First Security receivership estate. As previously discussed,

under the scheme of distribution of receivership assets mandated by 12 U.S.C. § 1821(d)(11)(B), the FDIC is obliged to turn over to the shareholders of a failed bank any assets remaining after disbursements for administrative expenses, deposit liabilities, and senior and subordinated debt obligations. Accordingly, a cause of action which could render an FDIC receivership estate solvent is sufficient, in and of itself, to entitle a shareholder to maintain the action. *See, e.g., California Housing Securities, Inc. v. United States*, 959 F.2d 955, 957 n.2 (9th Cir.), *cert. denied*, 113 S. Ct. 324 (1992) (bank holding company had direct standing to sue on behalf of insolvent bank since successful outcome would result in receivership surplus); *Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995) (where judgment favorable to bankruptcy trustee of bank holding company "could result in a surplus that would benefit [the bank holding company's] shareholders," shareholders had direct interest in litigation); *cf. Herring v. FDIC*, 82 F.3d 282, 285 (9th Cir. 1996) (because shareholders' action could have had no chance of generating receivership surplus, shareholders did not have standing to pursue claims).

Second, even if FIRREA could be said generally to permit the FDIC to succeed to shareholder derivative actions, substitution of the FDIC as plaintiff here was inappropriate because the FDIC could not adequately represent the Petitioners' interests in the litigation. The FDIC, for more than a year after its appointment as receiver, declined to participate in the litigation against the defendants because of acknowledged conflicts of interest in suing an FDIC-insured institution. When the FDIC decided to participate in the lawsuit, it made every effort to supplant the Petitioners with respect to both the derivative and nonderivative claims. Soon after the

district court granted the FDIC the exclusive right to pursue the litigation against the defendants, the FDIC and the defendants entered into a settlement agreement, and the FDIC resisted numerous requests by the Petitioners to reveal the terms of the agreement. The FDIC's conduct clearly evidences a conflict of interest which has resulted in inadequate representation of the Petitioners' interests by the FDIC. *Cf. Suess v. United States*, 33 Fed. Cl. at 97 ("The idea that the RTC will adequately protect the rights of shareholders by suing itself is nothing more than a rhetorical sleight of hand and is of little comfort to former shareholders who suddenly lose not only their rights and interest in a failed institution but also the right to litigate those rights"); *Branch v. FDIC*, 825 F. Supp. at 406 (where FDIC would be suing itself, irreconcilable conflict of interest would result which would prevent an exercise of unprejudiced judgment).

In sum, FIRREA does not bestow on the FDIC, as receiver of a failed institution, the right to succeed to derivative actions brought by shareholders of the institution. And even if such a general right could be read into the statute, the FDIC was not entitled to supplant the Petitioners in this case since (1) the Petitioners' suit, if successful, will generate a receivership surplus, and (2) the FDIC cannot adequately represent the Petitioners' interests in light of acknowledged conflicts of interest on the part of the FDIC.

III. THE LOWER COURTS ERRED IN DENYING THE PETITIONERS THE RIGHT TO INTERVENE IN ORDER TO PROSECUTE THEIR DERIVATIVE AND NONDERIVATIVE CLAIMS.

Rule 24(a) of the Federal Rules of Civil Procedure permits, in some circumstances, intervention as a matter of right. The courts agree that the moving party will establish its right to intervene under Rule 24(a)(2) upon timely application by demonstrating (1) that it has an interest in the subject matter of the action, (2) that disposition of the action may practically impair or impede the movant's ability to protect that interest, and (3) that that interest is not adequately represented by the existing parties. *E.g., Sierra Club v. Espy*, 18 F.3d 1202, 1204-05 (5th Cir. 1994); *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994); *American Lung Association v. Reilly*, 962 F.2d 258, 261 (2d Cir. 1992).

Here, as discussed below, the Petitioners submitted ample evidence to the lower courts of each of the three elements. First, the Petitioners plainly held an interest in the subject matter of the action. With respect to the nonderivative causes of action, claims which seek compensation for wrongs directly affecting the Petitioners and which, by their nature, cannot result in compensable injury to the receivership, the interests of the Petitioners are manifest. The Petitioners also hold an interest in the derivative claims because, as discussed in Part II, *supra*, a successful resolution of the claims will result in a surplus which will be distributed to shareholders of First Security. In any event, the interest of Petitioner Anthony in the

outcome of the litigation, since he holds an ownership interest in the lawsuit against the defendants, cannot seriously be disputed. *See, e.g., Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989) (district court erred in denying former attorney's motion to intervene in order to secure rights under contingent fee agreement), *aff'd on other grounds, Venegas v. Mitchell*, 495 U.S. 82 (1990); *Keith v. St. George Packing Co.*, 806 F.2d 525, 526 (5th Cir. 1986) (discharged lawyer with a contingent fee agreement holds interest for purposes of intervention).

The second prong of the intervention-as-of-right test is also satisfied. It is straightforward that disposition of the action may practically impair or impede the Petitioners' ability to protect their interests. Indeed, unless the lower courts' error is corrected, the Petitioners will be deprived of any right to pursue their action against the defendants.

Finally, it is clear that the Petitioners' interests are not adequately protected by the FDIC. *See Trbovich v. United States of America*, 404 U.S. 528, 538 n.10 (1972) (burden of showing inadequate representation for purposes of Rule 24(a)(2) is "minimal"). Not only has the FDIC acknowledged a conflict of interest in pursuing the claims against an FDIC-insured institution, but the FDIC's lack of zealousness in pursuing the claims against the defendants has been readily apparent in its conduct during the entire course of the litigation. *Accord Federal Savings & Loan Insurance Corp. v. Falls Chase Special Taxing District*, 983 F.2d 211, 216 (11th Cir. 1993) (where appellants demonstrated that FDIC possessed interests antagonistic to those of one of the appellants and that FDIC was engaging in settlement negotiations with national bank rather than vigorously prosecuting claims, appellants should have

been granted leave to intervene as matter of right). Moreover, the FDIC has no interest whatsoever in pursuing the Petitioners' nonderivative claims, which cannot result in a recovery for the receivership. Finally, the FDIC's incentive to recover damages from an FDIC-insured institution in order to augment a receivership estate certainly is less than adequate to protect Anthony's ownership interest in the amount of recovery from the defendants.

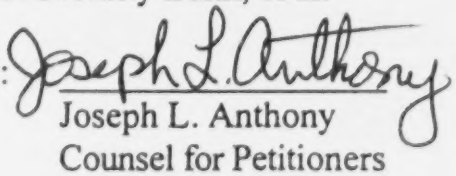
The Petitioners demonstrated to the lower courts that they possessed an interest in the subject matter of this litigation, that the disposition of the action would impede their ability to protect their interests, and that the interests were not adequately protected by the FDIC. The Petitioners therefore were entitled to intervene in the litigation as a matter of right, and the lower courts erred in denying their motion to intervene.

CONCLUSION

For all of the foregoing reasons, the Petitioners request this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

Joseph L. Anthony, Pro Se
First Security Bank, et al.

By: 
Joseph L. Anthony
Counsel for Petitioners

STOTT & ANTHONY, P.C.
Suite 700
Liberty Trust Building
101 South Jefferson Street
Roanoke, Virginia 24011
(540) 345-7511

NO.

In The
Supreme Court Of The United States

October Term, 1996

FIRST SECURITY BANK, et al.,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and FIRST VIRGINIA BANK-SOUTHWEST, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

APPENDIX

Joseph L. Anthony, Esquire
Stott & Anthony, P.C.
Suite 700
Liberty Trust Building
101 South Jefferson Street
Roanoke, Virginia 24011
(540) 345-7511
Counsel for Petitioners

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92 SEP 29
JOYCE F. WITT, CLERK
BY: /s/ R. Collins
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

FIRST SECURITY BANK, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 91-0275-R
FIRST VIRGINIA BANK –SOUTHWEST, et al.,	)	
Defendants.	)	

ORDER

On September 15, 1992, the parties, by their counsel, and the Federal Deposit Insurance Corporation in its capacity as Receiver for First Security Bank, by its counsel, appeared before the Court for argument upon the various motions previously filed herein, as hereinafter referenced. Upon consideration of the motions, memoranda filed therewith, and argument of counsel, it is hereby ADJUDGED and ORDERED as follows:

1. The Federal Deposit Insurance Corporation, as Receiver for First Security Bank, is hereby substituted as the plaintiff in this proceeding in the place and stead of

First Security Bank and its officers, directors, and shareholders in their derivative capacities. It is further ORDERED that Christopher M. Malone, Esquire, and John B. Farmer, Esquire, of the law firm of Thompson & McMullan, P.C., 100 Shockoe Slip, Richmond, Virginia 23219, shall be noted as counsel of record for the Federal Deposit Insurance Corporation, as Receiver for First Security Bank.

2. It is further ORDERED that Joseph L. Anthony, Esquire, of the firm of Stott and Anthony, P.C., Liberty Trust Building, Suite 1700, 101 South Jefferson Street, Roanoke, Virginia 24011, shall remain as counsel of record to the following individual plaintiffs, in their individual capacity for non-derivative claims: James D. Fralin, Carlos E. Gutierrez, Dennis R. Cronk, Paul G. Black, Jerry W. Brinkley, Alfred Silverstein, James M. Grasse, Lynn J. Reese, and Robert R. Hale.

3. It is further ORDERED that Joseph L. Anthony and the firm of Stott & Anthony, P.C. shall immediately upon entry of this Order, deliver to the law firm of Thompson & McMullan, P.C., as counsel for the Federal Deposit Insurance Corporation, as Receiver for First Security Bank, the originals or copies of any and all documents in their possession related to the prior representation of the interests of First Security Bank and its officers, directors and shareholders in their derivative capacity, in this proceeding. For the purposes of this Order, the term "document" shall be deemed to include the original and any copy of any and all written, printed, typed, recorded, telegraphic, drawn and or graphic matter, photographic matter, computer generated and/or stored data and/or information, and/or sound reproduction on tapes, records, and/or other devices.

4. It is further ORDERED that, except as herein otherwise provided, the following motions previously filed herein on behalf of the plaintiffs by their counsel, Joseph L. Anthony, shall be and the same are hereby DENIED: Motion for Permissive Joinder of the Federal Deposit Insurance Corporation as a Party-Plaintiff; Motion to Determine that the Federal Deposit Insurance Corporation has Abandoned Suit; Motion for Disclosure; and Motion to Allow Original Plaintiffs' Counsel to Remain as Counsel.

5. Upon the joint motion of counsel for all parties, it is hereby ORDERED that counsel for the defendants shall, if they be so advised, file memoranda in support of their motions to dismiss within fifteen days after the entry of this Order. Thereafter, counsel for the plaintiffs shall have a period of thirty days within which to file responsive memoranda. The defendant shall then have an additional period of fifteen days to file rebuttal memoranda with respect to these issues.

ENTER: 29 Sept 1992 /s/ James C. Turk
James C. Turk, Chief United States District Judge

I ask for this:

ENTERED
9-30-92

Christopher M. Malone, Esquire
Virginia State Bar No. 18678
John B. Farmer, Esquire
Virginia State Bar No. 29328
Counsel for FDIC as Receiver
of First Security Bank

A TRUE COPY, TESTE
JOYCE F. WITT, CLERK
BY: /s/ R Collins
DEPUTY CLERK

Thompson & McMullan, P.C.
100 Shockoe Slip
Richmond, Virginia 23219
(804) 649-7545

Seen and objected to:

Joseph L. Anthony, Esquire
Virginia State Bar No. 15092
Stott & Anthony, P.C.
Counsel for James D. Fralin,
et al. in Their Individual
Capacities
Liberty Trust Building, Suite 700
101 South Jefferson Street
Roanoke, Virginia 24011

Seen:

Douglas W. Densmore, Esquire
Virginia State Bar No. 19994
Counsel for First Virginia
Bank, et al.
Woods, Rogers & Hazlegrove
P.O. Box 720
Roanoke, Virginia 24004-0720

Charles O. Cornelison, Esquire
Virginia State Bar No.
Counsel for First Virginia
Bank, et al.
Copenhaver, Ellett & Cornelison

420 Shenandoah Building
205 First Street, S.W.
Roanoke, Virginia 24011-1911

Jonathan M. Apgar, Esquire
Virginia State Bar No.
Counsel for Richard A. Hess
Damico & Apgar
P.O. Box 1578
Roanoke, Virginia 24007

Anthony F. Anderson, Esquire
Virginia State Bar No.
Counsel for Thomas E. Hartman
P.O. Box 1525
Roanoke, VA 24007

ENTERED

CLERK'S OFFICE U.S. DIST. CT.
AT ROANOKE, VA.
FILED
SEP 10 1993
JOYCE F. WITT, CLERK
By:
Deputy Clerk
/s/ R Collins

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

FIRST SECURITY BANK, et al.,	)	
	)	
Plaintiffs	)	
	)	Civil No. 91-0275-R
v.	)	
	)	**ORDER**
FIRST VIRGINIA BANK–SOUTHWEST, et al.,	)	
	)	
Defendants	)	

Upon consideration of the motions noticed for hearing on September 1, 1993, it is hereby **ORDERED** that:

1. For the reasons stated into the record, the Federal Deposit Insurance Corporation's motion to strike the appearance of counsel is **GRANTED** and Joseph P. Anthony's appearance as counsel for the plaintiffs is hereby **STRICKEN**. Furthermore, if Mr. Anthony wishes to appear as counsel for any plaintiffs in the above-styled matter, he must file a motion to intervene, pursuant to

F.R.C.P. 24, setting forth with specificity each and every nonderivative claim that he represents.

2. Individual plaintiffs through their counsel, Joseph P. Anthony, have renewed motions to disqualify the firm of Thompson and McMullan as counsel for the F.D.I.C. the motions are but a rehash of arguments presented earlier, which the Court denied. These renewed motions are likewise **DENIED**.

The Clerk is directed to send a copy of this Order to all counsel of record.

ENTER this 10th day of September, 1993.

/s/ Jackson L. Kiser

Chief United States District Judge

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK
BY: */s/ L. Craft*
DEPUTY CLERK

CLERK'S OFFICE, U.S. DIST. CT.
AT ROANOKE, VA.
FILED
JUN 09 1994
MORGAN E. SCOTT, JR., Clerk
By: /s/ L. Craft
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

FIRST SECURITY BANK, ET AL.,	
	ENTERED
Plaintiffs	
	Civil Action No.
	91-0275-R
v.	
	ORDER
FIRST VIRGINIA BANK–SOUTHWEST, ET AL.,	
Defendants	

Pursuant to the Court's order of September 10, 1993, the individual plaintiffs through their counsel, Joseph L. Anthony, have filed a motion to intervene. The September 10 order required that a motion to intervene set forth, with specificity, each and every nonderivative claim asserted. The motion fails to comply with this directive. Rather than specifying nonderivative claims, the motion simply reiterates matters that have been previously considered and ruled on by the Court. Accordingly, the motion to intervene is hereby **DENIED**. A hearing on the

motion, which was tentatively set for 9:30 a.m. on June 23, 1994, is canceled.

The Clerk is directed to send a certified copy of this order to all counsel of record.

ENTER this 9th day of June, 1994.

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK
BY: /s/ L. Craft
DEPUTY CLERK

/s/ Jackson L. Kiser
Chief United States District Judge

CLERK'S OFFICE, U.S. DIST. CT.
AT ROANOKE, VA.
FILED
AUG 15 1994
MORGAN E. SCOTT, JR., Clerk
By: /s/ L. Craft
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

FIRST SECURITY BANK, ET AL.,	)	
	)	
Plaintiffs	)	
	)	Civil Action No.
	)	91-0275-R
v.	)	
	)	**ORDER**
FIRST VIRGINIA	)	
BANK–SOUTHWEST, ET AL.,	)	ENTERED
	)	8-16-94
Defendants	)	

Joseph L. Anthony has filed yet another motion to intervene in this litigation. This time he seeks to intervene as a ***pro se*** litigant in his individual capacity. His claim for intervention is predicated upon the assignment of a 30% interest in any recovery that the plaintiff receives. The 30% interest assignment, in turn, is based upon a contingent fee agreement entered into on April 17, 1991, with First Security Bank.

By order of September 10, 1993, this Court granted the FDIC's motion to strike the appearance of Joseph P.

[sic] Anthony. In striking the appearance of Mr. Anthony, the order provided that for him to appear as counsel for any of the original plaintiffs, it would be necessary for him to file a motion to intervene, pursuant to Fed.R.Civ.P. 24, and that the motion must set forth "with specificity each and every nonderivative claim that he represents."

Subsequently, Mr. Anthony filed a motion to intervene, but that motion was denied by the Court's order of June 9, 1994. The motion was denied because it failed to comply with the September 10, 1993, order which required any asserted nonderivative claim be set forth with specificity.

Mr. Anthony's current motion can rise no higher than the motion to intervene, which was denied by the Court's June 19, 1994, order. Accordingly, it is **ORDERED** that Joseph L. Anthony's motion to intervene in his own right, filed July 1, 1994, be and is hereby **DENIED**.

The Clerk is directed to send a certified copy of this order to all counsel of record.

ENTER this 15th day of August, 1994.

/s/ Jackson L. Kiser

Chief United States District Judge

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK
BY: /s/ L. Craft
DEPUTY CLERK

ENTERED

CLERK'S OFFICE, U.S. DIST. CT.
AT ROANOKE, VA.
FILED
JUL 10 1995
MORGAN E. SCOTT, JR., Clerk
By: /s/ B. Collins
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF FIRST SECURITY BANK	)
Plaintiff,	)Civil Action)No. 91-0275-R
v.	)
FIRST VIRGINIA BANK–SOUTHWEST, et al.	)
Defendants.	)

DISMISSAL ORDER

WHEREAS the plaintiff, the FDIC as Receiver of First Security Bank, the sole plaintiff in this case at this time, and the defendants, all by counsel, have advised the Court that the parties have reached a settlement as to the remaining claims stated in the Complaint and have requested that the Complaint be dismissed with prejudice as to such claims.

It is hereby ORDERED that the Complaint should be, and it hereby is, dismissed with prejudice.

The Clerk of the Court is directed to furnish a certified copy of this Order to counsel of record for the plaintiff and for the defendants and to strike this case from the Court's docket.

ENTERED this 10th Day of JULY, 1995.

/s/ Jackson L. Kiser

United States District Court Judge

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK
BY: /s/ R. Collins
DEPUTY CLERK

We request entry of this Order:

/s/ Douglas W. Densmore

Douglas W. Densmore
Virginia State Bar no. 19994
Kevin P. Oddo
Virginia State Bar no. 27503
Woods, Rogers & Hazelgrove, P.L.C.
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(703) 983-7600
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/s/ Charles O. Cornelison

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(703) 343-9349
Counsel for the Defendants

/s/ Christopher M. Malone

Christopher M. Malone
Virginia State Bar no. 18678
John B. Farmer
Virginia State Bar no. 29328
Thompson & McMullan
A Professional Corporation
100 Shockoe Slip
Richmond, Virginia 23219
(804) 649-7545
Counsel for the Federal Deposit Insurance Corporation
as Receiver of First Security Bank

CLERK'S OFFICE, U.S. DIST. CT.
AT ROANOKE, VA.
FILED
JUL 25 1995
MORGAN E. SCOTT, JR., Clerk
By: /s/ J. Farabee
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver of FIRST SECURITY BANK,	) Civil Action) No. 91-0275-R
Plaintiff,	)
v.	) ORDER
FIRST VIRGINIA BANK–SOUTHWEST, et al.,	) ENTERED 7/25/95
Defendants.	)

On February 17, 1995, I took under advisement a motion by Anthony and his proposed intervenors for an in camera review of the settlement agreement. Having further considered the motion, it is the opinion of the Court that it is without merit. Accordingly, it is hereby ADJUDGED and ORDERED that the motion, filed December 28, 1994, be DENIED.

The Clerk is directed to send a copy of this order to all counsel of record and to Joseph L. Anthony.

Entered this 25th day of July, 1995.

/s/ Jackson L. Kiser

Chief United States District Judge

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK
BY: /s/ J. Farabee
DEPUTY CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FIRST SECURITY BANK; JAMES D. FRALIN, as a director and individually as a shareholder of First Security Bank; CARLOS E. GUTIERREZ, as a director and individually as a shareholder of First Security Bank; DENNIS R. CRONK, as a director and individually as a shareholder of First Security Bank; PAUL G. BLACK, as a director and individually as a shareholder of First Security Bank; JERRY W. BRINKLEY, as a director and individually as a shareholder of First Security Bank; ALFRED SILVERSTEIN, as a director and individually as a shareholder of First Security Bank; JAMES M. GRASSE, a shareholder in First Security Bank; LYNN J. REESE, a shareholder in First Security Bank; ROBERT H. HALE, a shareholder in First Security Bank; OTHER UNNAMED SHAREHOLDERS OF FIRST SECURITY BANK, AS THEIR INTERESTS MAY APPEAR, *Plaintiffs-Appellants,* v.	No. 94-2040

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for First Security Bank,
Plaintiff-Appellee,

FIRST VIRGINIA BANK-SOUTHWEST; HENRY H. HICKS, JR.; JAMES N. HINSON, JR., officer and director of First Virginia Bank-Southwest in his individual and official capacity; ELLIS L. GUTSHALL, officer and director of First Virginia Bank-Southwest in his individual and official capacity,
Defendants-Appellees,

and

ROBERT H. ZALOKAR, Chairman of the Board and CEO First Virginia Banks, Incorporated, in his individual and official capacity; THOMAS E. HARTMAN, a former officer of First Virginia Bank-Southwest; RICHARD A. HESS,
Defendants.

FIRST SECURITY BANK; JAMES D. FRALIN, as a director and individually as a shareholder of First Security Bank; CARLOS E. GUTIERREZ, as a director and individually as a shareholder of First Security Bank; DENNIS R. CRONK, as a director and individually as a shareholder of First Security Bank; PAUL G. BLACK, as a director and individually as a shareholder of First Security Bank; JERRY W. BRINKLEY, as a director and individually as a shareholder of First Security Bank; ALFRED SILVERSTEIN, as a director and individually as a shareholder of First Security Bank; JAMES M. GRASSE, a shareholder in First Security Bank; LYNN J. REESE, a shareholder in First Security Bank; ROBERT H. HALE, a shareholder in First Security Bank; OTHER UNNAMED SHAREHOLDERS OF FIRST SECURITY BANK, AS THEIR INTERESTS MAY APPEAR; JOSEPH L. ANTHONY,
Plaintiffs-Appellants,

v. No. 94-2349

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for First Security Bank,
Plaintiff-Appellee,

v.

FIRST VIRGINIA BANK-SOUTHWEST; HENRY H. HICKS, JR.; JAMES N. HINSON, JR., officer and director of First Virginia Bank-Southwest in his individual and official capacity; ELLIS L. GUTSHALL, officer and director of First Virginia Bank-Southwest in his individual and official capacity,
Defendants-Appellees,

and

ROBERT H. ZALOKAR, Chairman of the Board and CEO First Virginia Banks, Incorporated, in his individual and official capacity; THOMAS E. HARTMAN, a former officer of First Virginia Bank-Southwest; RICHARD A. HESS,
Defendants.

FIRST SECURITY BANK; JAMES D. FRALIN, as a director and individually as a shareholder of First Security Bank; CARLOS E. GUTIERREZ, as a director and individually as a shareholder of First Security Bank; DENNIS R. CRONK, as a director and individually as a shareholder of First Security Bank; PAUL G. BLACK, as a director and individually as a shareholder of First Security Bank; JERRY W. BRINKLEY, as a director and individually as a shareholder of First Security Bank; ALFRED SILVERSTEIN, as a director and individually as a shareholder of First Security Bank; JAMES M. GRASSE, a shareholder in First Security Bank; LYNN J. REESE, a shareholder in First Security Bank; ROBERT H. HALE, a shareholder in First Security Bank; OTHER UNNAMED SHAREHOLDERS OF FIRST SECURITY BANK, AS THEIR INTERESTS MAY APPEAR; JOSEPH L. ANTHONY,

Plaintiffs-Appellants,

v.

No. 94-2693

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for First Security Bank,
Plaintiff-Appellee,

FIRST VIRGINIA BANK-SOUTHWEST; HENRY H. HICKS, JR.; JAMES N. HINSON, JR., officer and director of First Virginia Bank-Southwest in his individual and official capacity; ELLIS L. GUTSHALL, officer and director of First Virginia Bank-Southwest in his individual and official capacity,
Defendants-Appellees,

and

ROBERT H. ZALOKAR, Chairman of the Board and CEO First Virginia Banks, Incorporated, in his individual and official capacity; THOMAS E. HARTMAN, a former officer of First Virginia Bank-Southwest; RICHARD A. HESS,
Defendants.

Appeals from the United States District Court
for the Western District of Virginia, at Roanoke.
Jackson L. Kiser, Chief District Judge
(CA-91-275-R)

Argued: June 6, 1996

Decided: July 22, 1996

Before WILLIAMS and MICHAEL, Circuit Judges, and JACKSON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Joseph L. Anthony, STOTT & ANTHONY, P.C., Roanoke, Virginia, for Appellants. James Scott Watson, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C.; Douglas Warren Densmore, FLIPPIN, DENSMORE, MORSE, RUTHERFORD & JESSEE, Roanoke, Virginia, for Appellees. **ON BRIEF:** Kevin P. Oddo, FLIPPIN, DENSMORE, MORSE, RUTHERFORD & JESSEE, Roanoke, Virginia; Christopher M. Malone, John B. Farmer, THOMPSON & MCMULLAN, P.C., Richmond, Virginia; Ann S. DuRoss, Assistant General Counsel, Robert D. McGillicuddy, Senior Counsel, Michelle Kosse, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C.; Charles O. Cornelison, COPENHAVER, ELLETT & CORNELISON, Roanoke, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellants in this suit are the now-defunct First Security Bank, First Security's former directors or shareholders or both,*** and First Security's former counsel, Joseph Anthony. First Security and its directors/shareholders retained Anthony to represent them in litigation against First Virginia Bank, First Virginia Bank's directors, and its parent company, First Virginia Bank-South West (collectively First Virginia), all of which are Appellees to this appeal. After Anthony had filed a variety of claims against First Virginia, First Security was declared insolvent and placed under the receivership of the Federal Deposit Insurance Corporation (FDIC). Consequently, the FDIC succeeded to First Security's interests and represented First Security on its claims against First Virginia. *See* 12 U.S.C.A. § 1821(d)(2)(A)(i) (West 1989) (providing that the FDIC, in its capacity of receiver, succeeds to "all rights, titles, powers, and privileges of the [failed institution], and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution"). Anthony, however, remained as counsel for the directors/shareholders regarding any claims, which the parties and the district court termed "nonderivative claims," against First Virginia

***James Fralin, Carlos Gutierrez, Dennis Cronk, Paul Black, Jerry Brinkley, Alfred Silverstein, James Grasse, Lynn Reese, and Robert Hale were directors or shareholders or both of First Security.

that were independent of the First Security litigation against First Virginia. Having succeeded to First Security's claims against First Virginia, the FDIC terminated Anthony's representation of First Security and pursued the litigation against First Virginia. After the FDIC and First Virginia settled their suit, they successfully moved the district court to dismiss it with prejudice.

Anthony raised sixty-three assignments of error in his briefs to this Court in this consolidation of three appeals of the district court's orders. First, Anthony appeals the district court's denial of his motion to intervene as of right on behalf of the former shareholders and directors of First Security respecting any nonderivative claims First Security could have asserted against First Virginia prior to First Security's insolvency. Second, Anthony appeals the district court's denial of his request to intervene as a pro se litigant due to his claim for attorney's fees in the amount of a one-third share of claims First Security could have asserted against First Virginia prior to First Security's insolvency. Third, Anthony appeals the district court's denial of his motion to impress a lien on the FDIC for his attorney's fees and the district court's dismissal of the settled claims.

We have carefully examined the record, the briefs, the applicable law, and have had the benefit of the parties' oral argument. We affirm the district court's orders, finding Anthony's assignments of error without merit. Accordingly, the judgments of the district court are affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 17, 1996

No. 94-2040
CA-91-275-R

FIRST SECURITY BANK; JAMES D. FRALIN, as a director and individually as a shareholder of First Security Bank; CARLOS E. GUTIERREZ, as a director and individually as a shareholder of First Security Bank; DENNIS R. CRONK, as a director and individually as a shareholder of First Security Bank; PAUL G. BLACK, as a director and individually as a shareholder of First Security Bank; JERRY W. BRINKLEY, as a director and individually as a shareholder of First Security Bank; ALFRED SILVERSTEIN, as a director and individually as a shareholder of First Security Bank; JAMES M. GRASSE, a shareholder in First Security Bank; LYNN J. REESE, a shareholder in First Security Bank; ROBERT H. HALE, a shareholder in First Security Bank; OTHER UNNAMED SHAREHOLDERS OF FIRST SECURITY BANK, AS THEIR INTERESTS MAY APPEAR;

Plaintiffs - Appellants

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for First Security Bank

Plaintiff - Appellee

FIRST VIRGINIA BANK-SOUTHWEST; HENRY H. HICKS, JR.; JAMES N. HINSON, JR., officer and director of First Virginia Bank-Southwest in his individual and official capacity; ELLIS L. GUTSHALL, officer and director of First Virginia Bank-Southwest in his individual and official capacity

Defendants - Appellees

and

ROBERT H. ZALOKAR, Chairman of the Board and CEO First Virginia Banks, Incorporated, in his individual and official capacity; THOMAS E. HARTMAN, a former officer of First Virginia Bank-Southwest; RICHARD A. HESS

Defendants

No. 94-2349
CA-91-275-R

FIRST SECURITY BANK; JAMES D. FRALIN, as a director and individually as a shareholder of First Security Bank; CARLOS E. GUTIERREZ, as a director and individually as a shareholder of First Security Bank; DENNIS R. CRONK, as a director and individually as a shareholder of First Security Bank; PAUL G. BLACK, as a director and individually as a shareholder of First Security Bank; JERRY W. BRINKLEY, as a director and individually as a shareholder of First Security Bank; ALFRED SILVERSTEIN, as a director and individually as a shareholder of First Security Bank; JAMES M. GRASSE, a shareholder in First Security Bank; LYNN J. REESE, a shareholder in First Security Bank; ROBERT H. HALE, a shareholder in First Security Bank; OTHER UNNAMED SHAREHOLDERS OF

FIRST SECURITY BANK, AS THEIR INTERESTS MAY APPEAR; JOSEPH L. ANTHONY;

Plaintiffs - Appellants

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for First Security Bank

Plaintiff - Appellee

v.

FIRST VIRGINIA BANK-SOUTHWEST; HENRY H. HICKS, JR.; JAMES N. HINSON, JR., officer and director of First Virginia Bank-Southwest in his individual and official capacity; ELLIS L. GUTSHALL, officer and director of First Virginia Bank-Southwest in his individual and official capacity

Defendants - Appellees

and

ROBERT H. ZALOKAR, Chairman of the Board and CEO First Virginia Banks, Incorporated, in his individual and official capacity; THOMAS E. HARTMAN, a former officer of First Virginia Bank-Southwest; RICHARD A. HESS

Defendants

No. 95-2693
CA-91-275-R

FIRST SECURITY BANK; JAMES D. FRALIN, as a director and individually as a shareholder of First Security Bank; CARLOS E. GUTIERREZ, as a director and individually as a shareholder of First Security Bank; DENNIS R. CRONK, as

a director and individually as a shareholder of First Security Bank; PAUL G. BLACK, as a director and individually as a shareholder of First Security Bank; JERRY W. BRINKLEY, as a director and individually as a shareholder of First Security Bank; ALFRED SILVERSTEIN, as a director and individually as a shareholder of First Security Bank; JAMES M. GRASSE, a shareholder in First Security Bank; LYNN J. REESE, a shareholder in First Security Bank; ROBERT H. HALE, a shareholder in First Security Bank; OTHER UNNAMED SHAREHOLDERS OF FIRST SECURITY BANK, AS THEIR INTERESTS MAY APPEAR; JOSEPH L. ANTHONY;

Plaintiffs - Appellants

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for First Security Bank

FIRST VIRGINIA BANK-SOUTHWEST; HENRY H. HICKS, JR.; JAMES N. HINSON, JR., officer and director of First Virginia Bank-Southwest in his individual and official capacity; ELLIS L. GUTSHALL, officer and director of First Virginia Bank-Southwest in his individual and official capacity

Defendants - Appellees

and

ROBERT H. ZALOKAR, Chairman of the Board and CEO First Virginia Banks, Incorporated, in his individual and official capacity; THOMAS E. HARTMAN, a former officer of First Virginia Bank-Southwest; RICHARD A. HESS

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
ACTING CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 25, 1996

No. 94-2040

First Security Bank v. First Virginia Bank

No. 94-2349
CA-91-275-R

First Security Bank v. First Virginia Bank

No. 95-2693
CA-91-275-R

First Virginia Bank v. First Security Bank

MANDATE

The judgment of this Court dated 7/22/96 takes effect today.

PATRICIA S. CONNOR
ACTING CLERK

Supreme Court, U.S.
FILED
FEB 12 1997
CLERK

No. 96-942

In the Supreme Court of the United States

OCTOBER TERM, 1996

FIRST SECURITY BANK, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of petitioners' request to intervene, when petitioners failed to comply with the district court's directive that they state with specificity their asserted interest in the litigation.

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FIRST SECURITY BANK, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. A17-A25) is unpublished, but the judgment is noted at 91 F.3d 130 (Table). The orders of the district court (Pet. App. A8-A9, A10-A11, A12-A14) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1996. A petition for rehearing was denied on September 25, 1996. The petition for a writ of certio-

rari was filed on December 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 18, 1991, First Security Bank (First Security), together with several of its shareholders and directors, filed suit against First Virginia Bank, Inc., its wholly owned subsidiary First Virginia Bank-Southwest (First Virginia), and certain of their officers and directors. The plaintiffs retained Joseph L. Anthony as counsel to pursue the case on a contingency-fee basis. The gravamen of the complaint was that the defendants engaged in a scheme to cover up bad loans that had been extended by Thomas E. Hartman during his tenure as a vice president of First Virginia, and that, when Hartman left First Virginia to serve as an officer of First Security, the defendants concealed from First Security the fact that Hartman had extended the bad loans. The plaintiffs alleged that the defendants' failure to disclose Hartman's lending indiscretions enabled Hartman to make fraudulent loans on behalf of First Security. Gov't C.A. Br. 4-5; Pet. 7.

2. On May 24, 1991, First Security was declared insolvent and the Federal Deposit Insurance Corporation (FDIC) was appointed as its receiver. Gov't C.A. Br. 5. As receiver, the FDIC succeeded to all of First Security's rights, titles, and interests, including its pending claims against the First Virginia defendants. See 12 U.S.C. 1821(d)(2)(A).

On May 30, 1991, the FDIC notified Anthony that all of First Security's putative creditors were required to file their claims with the FDIC by August 28, 1991. On August 15, 1991, the FDIC formally terminated Anthony's representation of First Security

and advised Anthony to submit any claims that he might have against First Security. Anthony's law firm submitted one such claim, on which the FDIC ultimately issued payment (in the form of a receiver's certificate) in the amount of $3,535.50. Gov't C.A. Br. 5-6.

Anthony, however, refused to acknowledge that he had been terminated as First Security's counsel, and refused to join in a consent order substituting the FDIC as plaintiff. Accordingly, the FDIC was forced to move to compel Anthony to relinquish all litigation files in his possession related to the case and to substitute itself as sole plaintiff. Gov't C.A. Br. 6.

Although none of the counts in the complaint set forth a claim of direct injury to any of First Security's shareholders or directors, the FDIC later scaled back its substitution motion to request that it be substituted as plaintiff only with respect to those claims asserted directly by First Security. Gov't C.A. Br. 6. The parties and the district court referred to First Security's claims as "derivative claims," and to whatever separate and independent claims the named individuals might have had as "nonderivative claims." *Id.* at 6 n.3. Those short-hand designations were inaccurate, however, because the complaint did not actually purport to state any derivative claims, and it contained no allegations that met the requirements for a derivative claim under Rule 23.1 of the Federal Rules of Civil Procedure. See C.A. App. 11-73. Rather, all of the claims asserted concerned injuries suffered directly by First Security.

On September 29, 1992, the district court granted the FDIC's modified substitution motion. It ordered the substitution of the FDIC as successor in interest to First Security's "derivative claims" (i.e., the

claims for injuries suffered by First Security Bank), and directed Anthony to relinquish all files in his possession relating to those claims. Pet. App. A1-A2. The court permitted Anthony to remain in the case as counsel for the individual shareholders and directors with respect to whatever "nonderivative claims" they might have, without deciding at that juncture whether any such claims had been alleged in the complaint. *Id.* at A2.

Anthony challenged that order by filing numerous successive pleadings, including a notice of appearance of counsel, in which he stated that he represented the plaintiff-shareholders of First Security Bank in their "derivative claims." On September 10, 1993, the district court granted the FDIC's motion to strike Anthony's appearance as counsel for the individual shareholders and directors with respect to those claims. The court advised Anthony that, "if [he] wishe[d] to appear as counsel for any plaintiffs in the [action], he [would have to] file a motion to intervene, pursuant to F.R.C.P. 24, setting forth with specificity each and every nonderivative claim that he represent[ed]." Pet. App. A6-A7. On September 17, 1993, the court denied Anthony's motion to "Reconsider, Rehear, Vacate and/or Amend," and it ordered the clerk of court not to receive or file further pleadings from Anthony in this case unless those pleadings conformed to the September 10, 1993, order. Gov't C.A. Br. 9-10.

On January 3, 1994, Anthony filed a motion to intervene to assert both "derivative" and "nonderivative" claims purportedly on behalf of the individual shareholders and directors of First Security. On June 9, 1994, the district court rejected that motion, on the ground that it failed to comply with the court's

instruction that any such motion set forth with specificity any claim that could be considered independent and separate from those asserted directly by First Security. Pet. App. A8-A9.

On July 1, 1994, Anthony filed a second motion to intervene, this time seeking to assert claims in his personal capacity as a *pro se* litigant. Anthony claimed that he was entitled to a 30% share in the claims against the First Virginia defendants under the contingency fee arrangement he had made with First Security before its demise. The district court again denied intervention. It concluded that Anthony's *pro se* motion "r[o]se no higher" than the motion to intervene that he had filed on behalf of the individual shareholders and directors. Pet. App. A10-A11.

Anthony next filed a "Notice of Lien" and a "Motion to Impress Lien," in which he claimed to have an attorney's lien upon the case as security for his fees and services rendered. The district court struck the notice of lien and denied Anthony's motion to impress a lien. The court observed that, by virtue of 12 U.S.C. 1821(d)(13)(D), it had no subject matter jurisdiction to review in the first instance claims against the assets of a failed depository institution, and that Anthony's exclusive recourse was to pursue his claims according to the administrative procedures set forth in 12 U.S.C. 1821 (d)(3)-(10). Anthony had not followed those procedures, however, and the 90-day deadline for doing so (see 12 U.S.C. 1821(d)(3)(B)(i) and (d)(5)(C)(i)) had long since run. Gov't C.A. Br. 11-12.

3. On December 13, 1993, the district court granted the First Virginia defendants' motion to dismiss in part and denied it in part. In its order, the court observed that the complaint stated no claims on

behalf of First Security's shareholders and directors that were distinct from First Security's own claims. Gov't C.A. Br. 12-13.

After discovery, the FDIC and the First Virginia defendants agreed to settle the case. They submitted a draft joint order requesting the district court to dismiss the complaint with prejudice, which the court entered on July 10, 1995. Pet. App. 12a-13a.

4. Anthony and the shareholders and directors he represents (petitioners herein) filed three successive notices of appeal, raising 63 assignments of error. They appealed (i) the district court's June 9, 1994, order denying Anthony's motion to intervene on behalf of the shareholders and directors; (ii) the district court's August 15, 1994, order denying Anthony's motion to intervene as a pro se litigant to assert his personal claim for a 30% share in the claims that First Security could have asserted against the First Virginia defendants; and (iii) the district court's denial of Anthony's motion to impress a lien on the FDIC, and its July 10, 1995, order dismissing the case with prejudice. The court of appeals consolidated the appeals, and it summarily affirmed each of the challenged orders. Pet. App. A17-A25.

ARGUMENT

1. Petitioners contend (Pet. 12-15, 20-22) that the court of appeals erred in affirming the district court's order denying their initial motion to intervene to assert the shareholders' and directors' "nonderivative claims." They argue that the court's decision conflicts with *In re Sunrise Securities Litigation*, 916 F.2d 874, 889 (3d Cir. 1990), *FDIC* v. *Jenkins*, 888 F.2d 1537, 1546 (11th Cir. 1989), and *Howard* v. *Haddad*, 916 F.2d 167 (4th Cir. 1990), which upheld the right of

institution-related parties to assert their own individual, nonderivative claims against officers and directors of a failed depository institution. Petitioners' reliance on those cases is misplaced. The district court did not deny petitioners' motion to intervene out of a mistaken belief that individual shareholders and directors can never assert nonderivative claims against a receivership, but rather because petitioners failed to heed the district court's directive that they state with specificity any nonderivative claims that they wished to assert. Pet. App. A8. Petitioners' disagreement with the district court's conclusion respecting the sufficiency of their pleadings is fact-bound and does not warrant further review.

2. Petitioners argue (Pet. 16-22) that the district court should not have permitted the FDIC to be substituted as the proper party to assert the "derivative claims" in this case. That argument is without merit. As we have explained, notwithstanding the parties' and the district court's references to "derivative claims," that appellation was a misnomer. The claims in question, which related to injuries suffered directly by First Security, belonged in the first instance to First Security through its receiver, the FDIC. Such claims may be brought as derivative claims only following an unsuccessful demand on the receiver. See Fed. R. Civ. P. 23.1; see also *In re Sunrise Securities Litigation*, 916 F.2d at 879 & n.5. Petitioners had no occasion to make such a demand in this case because the FDIC prosecuted First Security's claims directly. Lacking standing to assert any derivative claims, petitioners made no pretense of doing so in their complaint.

3. To the extent petitioners argue (Pet. 18-19) that the FDIC should not have been substituted for First

Security with respect to First Security's claims because the FDIC had an "acknowledged" conflict of interest, that argument (which finds no support in the record) is foreclosed by the statute. As receiver, the FDIC succeeds to all of a depository institution's "rights, titles, powers, and privileges," including its choses in action. 12 U.S.C. 1821(d)(2)(A)(i). It is vested with the exclusive authority to operate the institution, to conduct the institution's business, and to collect the obligations owed the institution, all in accordance with the detailed provisions of the statute. 12 U.S.C. 1821(d)(2)(B), 1821(d)(2)(I). Although petitioners, as former shareholders, are residual claimants against the receivership, the FDIC as receiver possessed First Security's claims against the First Virginia defendants in the first instance, and, absent an unsuccessful demand, the FDIC was the sole party authorized to prosecute those claims. Permitting petitioners to sue directly for claims emanating from injury to the institution would, moreover, "circumvent the priority scheme by enabling [shareholders] to recover the institution's assets in advance of other general creditors and claimants with superior interests." *In re Sunrise Securities Litigation*, 916 F.2d at 889.

4. Finally, Anthony renews his contention that he is entitled to a 30% share in First Security's claims based upon the contingency arrangement he entered into with First Security before its demise, and that that purported interest gave him a property right in the underlying litigation. Pet. 20-22. That argument is without merit. Contrary to Anthony's view, he had no property interest in First Security's claims. After his discharge as counsel, Anthony was entitled solely to compensation in accordance with the princi-

ples of *quantum meruit*. See *Fary* v. *Aquino*, 241 S.E.2d 799, 800 (Va. 1978); *Heinzman* v. *Fine, Fine, Legum & Fine*, 234 S.E.2d 282, 286 (Va. 1977). His recourse, therefore, was to file an administrative claim for the reasonable value of the services that he rendered to First Security under the claims process established by 12 U.S.C. 1821(d)(3)-(10). Having failed to avail himself of the administrative claims process, Anthony was barred from seeking a remedy in federal district court. See 12 U.S.C. 1821(d)(13)(D); see, *e.g.*, *FDIC* v. *Shain, Schaffer & Rafanello*, 944 F.2d 129, 132-137 (3d Cir. 1991) (concluding that district court lacked jurisdiction over claims for attorneys' fees made outside the administrative procedure set forth in Section 1821); *RTC* v. *Elman*, 949 F.2d 624, 626-630 (2d Cir. 1991) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

WILLIAM F. KROENER
General Counsel

JACK D. SMITH
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ANN S. DUROSS
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Counsel
Federal Deposit Insurance Corporation

FEBRUARY 1997

Supreme Court, U.S.
FILED
FEB 28 1997
CLERK

(3)

NO. 96-942

In The
Supreme Court Of The United States

October Term, 1996

FIRST SECURITY BANK, et al.,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and FIRST VIRGINIA BANK-SOUTHWEST, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF OF PETITIONERS

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RESPONSE TO FDIC'S QUESTION PRESENTED

The Petition for Certiorari (hereafter "Petition") presented three questions for review. In its Brief in Opposition (hereafter "Opposition"), FDIC attempts to circumvent these questions by recasting them into one which is both confusing and misleading. FDIC's single, consolidated question completely ignores, inter alia, Petitioners' first and third questions.

FDIC's consolidated question does not encompass Petitioners' first issue as to whether the trial court erred in interpreting 12 U.S.C. §1821(d)(2)(A)(i) (hereafter "§1821(d)") as granting FDIC exclusive, expansive priority and authority over the derivative and nonderivative claims of shareholders of a defunct bank against third parties. FDIC further does not encompass/ answer Petitioners' third issue in that, contrary to FDIC's inference in its question presented, shareholder-Petitioners did fully comply with "the district court's directive that they state with specificity their asserted (nonderivative) interest in the litigation." However, whether shareholder-Petitioners did or did not comply with the district court's directive has absolutely nothing to do with Petitioner-Anthony's right to intervene. That is, the district court's directive in no way applied to Anthony, inter alia, because he was not a party to the underlying action when the court entered its directive. Since FDIC's single question presented applies solely to shareholder-Petitioners, who it alleges did not comply with the trial court's directive, FDIC must be conceding that Anthony's right to intervene was inappropriately denied.

Since the district court's 'directive' Order applied solely to Petitioners' nonderivative claims (Pet.App. A6-A7), Petitioners' two derivative motions to intervene–one filed before the 'directive' Order was entered and the other filed afterwards–should have been, but were not, evaluated under the established standards of F.R.C.P., Rule 24. The district court's expansive interpretation of §1821(d) should not have prevented Petitioners from intervening to monitor their derivative and nonderivative claims, especially where FDIC had an acknowledged conflict and dilemma with prosecuting this action. FDIC's consolidated question does not address this error by the trial court.

FDIC's consolidated question contains the parenthetical phrase "when petitioners failed to comply with the district court's directive that they state with specificity their asserted (nonderivative) interest in the litigation." As noted in the Petition, FDIC's Opposition, and herein, however, the only district court directive was as to the original shareholder-Petitioners and their direct, nonderivative claims (hereafter "nonderivative claims"). Accordingly, FDIC is now inferring that the only valid legal reason which it can proffer for the district court's denial of all the multiple motions to intervene by the multiple Petitioners is the alleged non-compliance with the court's directive as to the nonderivative claims. Under FDIC's own argument, then, Petitioners' second question presented for review must be answered in the affirmative because it concerns only the derivative claims.

FDIC's consolidated question does not address Petitioners' Questions Presented and, by glossing over distinctions and misdirecting the focus, essentially admits that all motions to intervene should have been granted related to shareholder-Petitioners' derivative claims and Anthony's derivative and nonderivative claims. Further, FDIC does not argue that Petitioners' Questions Presented for Review are inappropriate. FDIC apparently merely rolled Petitioners' three questions for review into one issue in order to confuse the legitimate issues raised by Petitioners and in order to more easily camouflage the defects of FDIC's own positions.

RESPONSE TO FDIC'S STATEMENT OF FACTS

FDIC's "Statement" of the facts (Opp. 2-6) is a masterful illusion which sets forth certain alleged facts and procedural matters which are either false or extremely misleading and which adds interpretations which are not contained in the record of this case--likely the result of their current counsel's not participating in the trial court proceedings or "the heavy press of earlier assigned cases to attorneys handling this matter" (FDIC's request for more time to file Opposition). Nonetheless, whether intentional or inadvertent, the statements might easily mislead this Court as to the record facts and the procedures in the trial court. Thus, Petitioners will address herein a few of those false and/or misleading statements which are material and obvious.

First, the statement (Opp. 2) that "[t]he plaintiffs retained ...Anthony as counsel to pursue the case on a contingency-fee basis" is misleading and completely ignores the material fact that Anthony also owns an outright 30% interest in all the derivative and nonderivative claims alleged in the Complaint. This uncontroverted fact is evidenced in the record, inter alia, by several sworn affidavits, including one from the CEO and Chairman of the Board of First Security. Thus, it is entirely misleading for FDIC to infer that Anthony's sole interest in this litigation is in the nature of a 'typical' contingency-fee.

Second, FDIC alleges (Opp. 2) that "[o]n May 30, 1991, the FDIC notified Anthony that all of First Security's putative creditors were required to file their claims with FDIC by August 28, 1991." This statement is false. A 'notice' was, in fact, sent to Stott & Anthony, P.C., a corporation that owned no interest in the causes of action; but Anthony received no such notice. Further, Anthony informed FDIC and its then counsel of his claim, and counsel for FDIC informed Anthony orally and in writing that the extent of his claim would have to be determined at a later date. This uncontroverted fact is supported in the record by both documentary evidence and affidavits. This false statement is misleading because it incorrectly infers that Anthony is required to submit his claim for an outright ownership of 30% of the cause of action and his claim on any recovery from a third party (i.e., someone other than FDIC) to FDIC.

Third, FDIC states (Opp. 2) that "[o]n August 15, 1991, the FDIC formally terminated Anthony's representation of First Security...." However, Anthony was not terminated in 1991, and the record below shows that he was not. Anthony, the original counsel of record, prepared and filed the Complaint, and no other person or entity filed any document to represent any plaintiff until July 31, 1992, when FDIC entered an appearance. It is absurd for FDIC to maintain now that Anthony's services were terminated on August 15, 1991, but that it decided not to enter an appearance until July 31, 1992, some eleven months later.

Fourth, FDIC alleges (Opp. 3) that "Anthony...refused to acknowledge that he had been terminated...." Anthony, however, could not "acknowledge" that he was terminated until he knew it.

The record below is documented with tangible evidence, including uncontroverted affidavits, proving that FDIC continuously and uninterruptedly used Anthony and/or his law firm after the alleged termination on August 15, 1991. Further, FDIC paid for the services so rendered.

Fifth, FDIC also states (Opp. 3) that "...none of the counts in the Complaint set [sic] forth a claim of direct injury to any of First Security's shareholders or directors...." After extensive briefing and oral argument, however, it was found that the Complaint did allege nonderivative claims, and an order (Pet.App. A-2) drafted by FDIC provided that "...Anthony...shall remain as counsel of record to the following individual plaintiffs, in their individual capacity for nonderivative claims...." Contrary to FDIC's current "argument" (Opp. 3-4), anyone reading the briefs submitted to the original trial court or the transcript of the hearing would know that it had been determined from the record and the Complaint that the Complaint did allege nonderivative claims.

Finally, Petitioners note that the Opposition is filled with deceptive statements and arguments. A fairly clear example is the statement (Opp. 5-6) that "[i]n its order (of December 13, 1993), the court observed that the Complaint stated no claims on behalf of First Security's shareholders and directors that were distinct from First Security's own claims." That Order, however, says absolutely nothing about whether "the complaint stated... claims on behalf of First Security's shareholders and directors." In fact, no order entered by any court herein has ever ruled that the Complaint did not allege nonderivative claims on behalf of shareholder-Petitioners. The court did "observe" and/or rule that the Complaint alleged nonderivative claims, stating that Anthony "shall remain" to represent those interests. When Petitioners repeatedly challenged defendants below and FDIC to produce any order ruling that the Complaint alleged no nonderivative claims, they ultimately admitted that no such order existed.

Solely for the purpose of dramatizing the difficulty for counsel not involved in the underlying, complex action to accurately state the facts in an appellate brief, Petitioners note that the motion to intervene filed by Anthony on July 1, 1994, was the

third one--not the 'second' as noted by FDIC (Opp. 5). However, space limitation does not allow for further detailing of false, incorrect, and/or misleading statements/arguments contained in FDIC's Opposition. Suffice it to say that there are many, many more which are likely the result of FDIC's having its Opposition drafted by counsel who had not participated in the district court proceedings.

RESPONSE TO FDIC'S ARGUMENT

In its Opposition, FDIC seeks to block review in this Court (1) by masking the clear conflict among the circuits on Petitioners' three questions, (2) by misstating the trial court record, (3) by falsely characterizing the orders and procedures below, and (4) by inappropriately attempting to consolidate and re-characterize Petitioners' meritorious questions for review.

1. FDIC begins its first argument with the false statement that Petitioners' "initial motion to intervene (was) to assert the shareholders' and directors' 'nonderivative claims.'" Filed on August 24, 1993, Petitioners' initial motion to intervene concerned only Petitioners' right to intervene as to their derivative claims. (JApp. C.A. 121-145). The penultimate sentence in FDIC's first argument also contains the false/misleading statement that "[t]he district court did not deny petitioners' motion to intervene out of a mistaken belief that individual shareholders and directors can never assert nonderivative claims against a receivership...." To the contrary, substituted Judge Kiser would never review the Complaint for nonderivative claims due to his mistaken belief, and this mistaken belief continued after he was repeatedly informed that his predecessor had already summarily determined that the Complaint did allege nonderivative claims. Without reviewing the Complaint for nonderivative claims, Judge Kiser mistakenly believed, based upon FDIC's "sacred cow" arguments at the time, that no director or shareholder of a defunct bank could simultaneously pursue a claim with FDIC. Thus, Judge Kiser cancelled the previously scheduled evidentiary hearing on Petitioners' derivative and nonderivative motion to intervene. For that same reason, an Order was never entered ruling that the Complaint did not allege nonderivative claims.

Contrary to FDIC's assertion now (Opp. 7), Petitioners do not disagree "with the district court's conclusion respecting the sufficiency of their pleadings." The district court never made a "conclusion respecting the sufficiency of [the] pleadings" because it could not get past its mistaken beliefs. The interpretation attributed by FDIC to Judge Kiser's June 9, 1994, Order (Pet. App. A-8) is not logical in view of the fact that the motion being denied was both a derivative and a nonderivative request by Petitioners to intervene. No person could read this particular motion to intervene as not "stat(ing) with specificity (the) nonderivative claims" which Anthony proposed to represent. Further, Judge Kiser also entered an Order on August 15, 1994 (Pet. App. A-11), providing that Anthony's pro se motion to intervene could "rise no higher than the [shareholder-Petitioners'] motion to intervene," clearly evidencing his mistaken belief as to FDIC's "sacred" position. Under these circumstances, the Court's mistaken belief as to the law should be reviewed by this Court.

2. FDIC's present counsel, not being involved in the trial court proceedings, entirely misunderstands the nomenclature of "derivative claims" employed by the trial court and then counsel for FDIC. After FDIC belatedly decided to get involved in this action with its acknowledged conflict, its then counsel initially used the phrase "derivative claims" to refer to the claims/rights to which FDIC succeeded by operation of law as an assignee, pursuant to §1821(d). In fact, the first order entered by the trial court employing the phrase "derivative" and "nonderivative claims" was entirely drafted by FDIC and entered over the strenuous objections of Petitioners. Accordingly, whether the underlying action was a class action under Rule 23 or a derivative action by shareholders under Rule 23.1 was never an issue for the trial court. As the trial court observed, the issue for it to decide was whether FDIC had an absolute right (even with its acknowledged conflict) to prosecute all in-court actions alleged in the Complaint merely because FDIC succeeded, as assignee, to the claims of First Security (ultimately determined by the record to be 70% of the "derivative" claims). Petitioners argue that even though FDIC, succeeded to the title of certain assets/claims of First Security, FDIC's acknowledged conflict prevented it from having the absolute right to solely represent in court those causes of action alleged--especially when the Complaint alleged damages which, if

recovered, would create a huge surplus in the Receivership Estate. To the contrary, FDIC argued that, even with its limited interests and its conflicts, it had absolute priority over the recovery related to all causes of action and an absolute right to solely prosecute this action. The trial court incorrectly agreed.

After Board approval, First Security and a group of its shareholders/directors filed this Complaint. This was before FDIC was appointed receiver and, as assignee, stepped into the shoes of the board of the defunct bank. Accordingly, the board of First Security had authorized and approved the filing of the action, whether a derivative action or not, before FDIC became title holder of any assets of the defunct bank. The day that FDIC was appointed receiver, by operation of state (i.e., Virginia Code §6.1-104) and Federal (i.e., §1821(d)) law, FDIC became the assignee of all assets/claims owned by its assignor, First Security. Contrary to FDIC's argument, an assignor cannot assign away more than it owns, nor take back an authorization (e.g., the consent to this action by shareholder-Petitioners) previously given. The real issue was not whether shareholder-Petitioners had to make additional Rule 23.1 demands of assignee-FDIC, but whether shareholder-Petitioners could remain and/or intervene in light of §1821(d). Anthony owned, absolutely and outright, 30% of all causes of action as of the date the Complaint was filed. Surely, FDIC would concede that Anthony was not required to make some further demand.

Contrary to FDIC's assertion in the penultimate sentence of section 2 (Opp. 7), Petitioners "had...occasion to make" and did make repeated demands upon FDIC, inter alia, to legitimately get involved in this case and then to allow them to prosecute the action, all to no avail. The record is voluminous regarding these demands, which are supported, inter alia, with uncontroverted affidavits. All Petitioners, including Anthony, were authorized to bring, inter alia, this derivative action and had standing to pursue these derivative claims, especially in light of FDIC's conflict and the potential huge surplus in the Receivership Estate resulting from a recovery from a third party.

Supporting Petitioners' position that the lower courts erred in permitting substitution of FDIC as the sole plaintiff with respect

to the derivative claims, Petitioners point out that FDIC's Opposition did not cite, differentiate, or respond to the five cases cited (Pet. 16-18) by Petitioners, concluding, inter alia, that §1821(d) does not divest a failed bank's shareholders of the right to assert a derivative action on behalf of the bank, especially when the cause of action could render an FDIC-Receivership Estate solvent. However, the instant case is even more compelling for shareholder-plaintiffs to pursue their own derivative claims because the record facts, without contradiction, prove conclusively that FDIC could not adequately represent Petitioners' interests in this litigation when FDIC and its counsel admitted their conflict in pursuing this mammoth action against a non-defunct FDIC-member bank. Symbolic of FDIC's demagoguery is its initial argument (Opp. 3 & 7) that the claims to which it succeeds as assignee are not really "derivative claims," then arguing thereafter that Petitioners were required to make a 'derivative demand' as if the claims were in fact derivative. Of course, it can not be both ways. In any event, the record is replete with uncontroverted evidence of prior approval by the Board of First Security and repeated unsuccessful demands upon FDIC to properly pursue the action or withdraw because of its conflict. Furthermore, FDIC's trial court counsel represented that these were "derivative claims" and prepared sketch orders calling Plaintiffs' claims derivative, absolutely refusing to honor Petitioners' "demands" due to its mistaken belief that §1821(d) created FDIC as a "sacred cow."

3. Section 3 of the Opposition purports to respond to pages 18 and 19 of the Petition which also includes the pages referenced in section 2 of the Opposition. Thus, section 2 of this Reply also responds to section 3 of the Opposition. However, a few points bear emphasis. First, the Opposition did not cite or respond to the cases and/or arguments of this section of the Petition (Pet. 16-22). Second, FDIC (Opp. 8) falsely alleges that the "acknowledged" conflict of interest finds no support in the record when the record is abundantly peppered with documentary evidence and uncontroverted affidavits quoting verbatim from transcripts of conversations with officers and counsel for FDIC, supporting the legal authority for and the factual basis of the conflict of interest. Third, noted supra, FDIC (Opp. 8) also alleges the absence of an unsuccessful demand after the Complaint was filed when the entire record supports and reflects that the trial

court and the parties always treated Petitioners' "demands" as an "unsuccessful demand." Accordingly, Petitioners correctly argue (Pet. 16-19) that the lower courts erred in permitting the wholesale substitution of FDIC as plaintiff with respect to the derivative claims.

4. Finally, FDIC disingenuously attempts to represent that the record below evidences that Anthony's only interest is a mere "contingency arrangement." In view of the record to the contrary, FDIC's current representations must be ignored. The record evidence is voluminous and uncontroverted, including multiple affidavits (JApp. C.A. 427-431; 434-438) that Anthony owned outright 30% of all the derivative and nonderivative claims and that he was assigned a 30% contingency fee interest to secure his receipt of any recovery from the First Virginia-defendants. Contrary to FDIC's view now, Anthony had a property interest in his own claims against the First Virginia-defendants and not on the claims of First Security, FDIC, or the Receivership Estate.

In any event, Anthony's interest in the outcome of the litigation cannot be seriously disputed because he holds both a contingent and an outright ownership interest in the derivative and nonderivative claims against the defendants. See Valley Ranch Dev. Co. v. FDIC, 960 F.2d 550 (5th Cir. 1992); Venegas v. Skaggs, 867 F.2d 527 (9th Cir. 1989). In Valley Ranch, a contingency fee contract alone constituted an "interest" permitting intervention. A fortiori, Anthony's outright ownership of 30% of the recovery is sufficient to constitute an "interest" for purposes of intervention. In Venegas, a plaintiff's former lawyer sought to intervene to confirm a lien for his fees, and the Court held that it was an abuse of discretion for the trial court to deny intervention while determining the merits of the contingency fee agreement.

Contrary to FDIC's view, the record evidence is that Anthony repeatedly made timely "administrative claims," but FDIC responded, in writing, that the non-quantifiable claim would have to be determined later. That date never came. The record, therefore, reflects that, even though Anthony's claim against the First Virginia-defendants (not FDIC or the Receivership Estate) was timely filed with FDIC, FDIC in effect requested an extension of time to ascertain the non-quantifiable amount of his claim.

Moreover, the law supports and the record shows, contrary to FDIC's view, that a claim against a third party, such as the First Virginia-defendants, does not have to be submitted through the "administrative claims" procedure of FDIC. FDIC's reliance on RTC v. Elman, 949 F.2d 624 (2d Cir. 1991) is, therefore, misplaced, even if Anthony had not timely filed his "contingent" claim with FDIC.

Further, FDIC's reliance on Elman, supra; Fary v. Aquino, 241 S.E.2d 799 (Va. 1978); Heinzman v. Fine, Fine, Legum & Fine, 234 S.E.2d 282 (Va. 1977); and FDIC v. Shain, Schaffer & Ratanello, 944 F.2d 129 (3rd Cir. 1991) is misplaced. First, none of these cases involve an attorney's outright, non-contingent, ownership interest in the cause of action. Second, none involve an attorney's right to intervene in order to monitor, prosecute, and protect his own interest. Third, Elman and Shain involve an attorney's retaining lien on a defunct bank's files. This appeal has absolutely nothing to do with a retaining lien on any files. Fourth, Fary and Heinzman, supra, hold that, even without an outright ownership interest, an attorney with a contingency fee arrangement owns a significant "interest." Fifth, Anthony's claims were not upon the files or other assets of FDIC's Receivership Estate, but upon his right to recover from a third party (the First Virginia-defendants). Sixth, Anthony had a right to intervene, pursuant to F.R.C.P. 24, without regard to whether he claimed a lien on the assets of FDIC or some third party.

CONCLUSION

For the reasons stated in the Petition for Certiorari and herein, this Court should--and the Petitioners request this Court to--issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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